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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

No. 89-1905

WISCONSIN PUBLIC INTERVENOR AND TOWN OF CASEY, PETITIONERS

v.

RALPH MORTIER AND WISCONSIN FORESTRY/RIGHTS-OF-WAY/ TURF COALITION, RESPONDENTS

On Writ of Certiorari to the Supreme Court of Wisconsin

BRIEF OF AMERICAN ASSOCIATION OF NURSERYMEN, AMERICAN PULPWOOD ASSOCIATION, ASSOCIATED LANDSCAPE CONTRACTORS OF AMERICA, CHEMICAL PRODUCERS AND DISTRIBUTORS ASSOCIATION, INDUSTRIAL BIOTECHNOLOGY ASSOCIATION, INTERNATIONAL APPLE INSTITUTE, INTERNATIONAL SANITARY SUPPLY ASSOCIATION, MIDWEST FOOD PROCESSORS ASSOCIATION, NATIONAL AGRICULTURAL AVIATION ASSOCIATION, NATIONAL ARBORIST ASSOCIATION, NATIONAL FERTILIZER SOLUTIONS ASSOCIATION, NATIONAL FOREST PRODUCTS ASSOCIATION, ROSES, INC., AND SOCIETY OF AMERICAN FLORISTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI CURIAE*[1]

The members of the *amici* organizations are involved with pesticides as producers, sellers or users.[2] They have a direct, immediate

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[1]Counsel for all parties have consented to the filing of this *amicus* brief. Their consents are on file with the Clerk of the Court.

[2]The American Association of Nurserymen represents 4,500 wholesale growers, garden center retailers, landscape firms and mail-order nursery businesses. The American Pulpwood Association represents the nation's pulp and paper mills, wood dealers and independent logging contractors. The Associated Landscape Contractors of America represents more than 800 landscape contracting firms. The Chemical Producers and Distributors Association comprises more than 80 companies manufacturing, formulating, distributing and selling pesticides used to protect food, feed and fiber crops, and for lawn, garden and turf care. The Industrial Biotechnology Association ("IBA") represents more than 100 small and large companies engaged in the research and development of biotechnology, including agricultural, pharmaceutical, food and environmental applications. The International Apple Institute includes 24 state and regional organizations of more than 10,000 producers who grow approximately 90% of the United States apple crop. The International Sanitary Supply Association consists of more than 3,400 companies engaged in the manufacture, formulation, distribution and sale of antimicrobial and general cleaning and

and substantial interest in whether the Federal Insecticide, Fungicide, and Rodenticide Act, as amended ("FIFRA"), 7

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maintenance products, including disinfectants, sanitizers and germicides used by hospitals, nursing homes, schools, food processing plants and institutional industrial establishments. The Midwest Food Processors Association represents members packing approximately 95% of the canned and frozen vegetables and fruits produced in Illinois, Minnesota and Wisconsin annually; members also use antimicrobial products in their plants. The National Agricultural Aviation Association represents 2,031 businesses which apply seed, fertilizer and crop protection chemicals to approximately 300 million acres of farm, ranch and forest lands annually. The National Arborist Association represents the nation's tree care industry; its members use pesticides carefully to protect the nation's urban and suburban trees. The National Fertilizer Solutions Association represents retail fertilizer and agrichemical dealers. The National Forest Products Association and its affiliate, the American Forest Council, represent more than 500 forest products companies that manage forestland and produce most of the nation's lumber and board products and rely on the judicious use of pesticides to manage competing vegetation and protect forestlands from pests. Roses, Inc., represents commercial greenhouses growing more than 80% of the commercial fresh-cut roses in the United States and Canada. The Society of American Florists represents growers, wholesalers, retailers, manufacturers and suppliers of floricultural and related products.

U.S.C. Sections 136-136y (1988), preempts local government regulation of pesticide use.

It is of paramount importance to all of the *amici* and to the public for the pesticide regulatory system in the United States to emphasize uniformity and predictability. The *amici* believe that these are precisely the goals that Congress intended when it amended FIFRA in 1972.

Members of *amicus* IBA are at the cutting edge of basic research in creating new forms of pesticides through genetic engineering. The revolutionary breakthroughs which biotechnology promises to achieve can transform the very nature of agriculture in the United States and provide novel pest control products that are safe yet effective substitutes for traditional chemical

pesticides.

The *amici* are concerned that a growing number of subunits of state government continue to enact pesticide regulations and do not have the expertise or the resources to administer or enforce them properly. This is contrary to the public interest. Local regulation does not contribute additional significance to pesticide safety; it offers only the chaotic potential to misinterpret an established system of regulation. It impedes the efforts of society to maximize the production of food and fiber and the potential of the nation's forests. It imposes needless costs and confusing, duplicative regulatory burdens upon homeowners, businesses, healthcare professionals and other pesticide users. It burdens emergency efforts to eradicate widespread infestations of voracious

pests such as gypsy moths and medflies. It needlessly delays innovative research and development of alternative pest control products created through biotechnology. Local regulation is a demonstrable, Draconian inefficiency within the established coordinated Federal and State pesticide regulatory system.

SUMMARY OF ARGUMENT

The comprehensive pesticide regulatory regime which Congress created in 1972 leaves no room for local regulation. The language and structure of FIFRA and its legislative history show that Congress preempted local regulation, which it deemed duplicative, burdensome and inconsistent with the purposes of the Act.

Wellhead protection under the Safe Drinking Water Act Amendments of 1986,

Pub. L. No. 99-339, 100 Stat. 642 (1986), is a State program in which each State is given maximum flexibility to decide which responsibilities, if any, to grant to local governments and is consistent with Federal preemption of local regulation of pesticide use.

The *amici* have been and will continue to be adversely affected by a multiplicity of inconsistent and uncoordinated local pesticide use regulations. Such regulation creates confusion for those who produce, sell and use pest control products; places issues involving technical considerations at the whim of parochial political pressures; exacts unnecessary costs upon homeowners and commercial and other users; creates a patchwork of conflicting restrictions burdening commerce; and impedes local and regional efforts to control widespread

pest infestations, particularly in neighboring jurisdictions.

Finally, by frustrating research into alternative pesticides, especially nontoxic, biodegradable pesticides created through genetic engineering, local regulation moves the United States away from the goal of reducing its use of conventional pest control products.

ARGUMENT

I. FIFRA AND ITS LEGISLATIVE HISTORY SHOW THE CLEAR INTENT OF CONGRESS TO PREEMPT LOCAL REGULATION OF THE USE OF PESTICIDES.

The issue in this case is whether local government entities may enact their own legislation regulating pesticide use. It is not about delegating authority to local governments to assist in carrying out Federal and State regulatory functions. FIFRA and its legislative history show that Congress unambiguously

intended that local units of government not possess autonomy over pesticide use. Even local participation in protecting wellhead areas is consistent with this clearly expressed intention.

A. FIFRA's Language and Structure Show that Local Pesticide Regulation Was to Be Derived Only from Express Delegation.

This Court's recent decisions on preemption make clear that it is the intent of Congress that controls whether a federal statute has preempted state or local regulation. *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985). The preemption analyses of local ordinances are the same as those for statewide laws. *Id.* at 713. Under the Court's preemption decisions, Federal law or regulation can preempt State law or local ordinances through explicit Federal statutory provisions or the

structure and purpose of the Federal statute; through implication if the Federal role is pervasive and all-encompassing; or through a conflict between State and Federal law. *English v. General Electric Co.*, 110 S. Ct. 2270, 2275 (1990). Inasmuch as "[t]he purpose of Congress is the ultimate touchstone," *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478, 482 (1990), the Court must examine the statutory language and the structure and purpose of FIFRA to determine the purpose of Congress. *Ingersoll-Rand, supra; FMC Corp. v. Holliday*, 111 S. Ct. 403, 407 (1990). The inevitable conclusion is that notwithstanding the absence of explicit language specifically forbidding governments from regulating local pesticide use, Congress intended unambiguously to preempt pesticide

regulation by local governments. The analysis further shows that independent local regulation of pesticide use was not to be a part of the "comprehensive regulatory statute" enacted in 1972, *Ruckelshaus v. Monsanto Company*, 467 U.S. 986, 991 (1984). That statute, the Federal Environmental Pesticide Control Act of 1972 ("FEPCA"), Pub. L. No. 92-516, 86 Stat. 973, created a "coordinated Federal-State administrative system to control the application of pesticides"[3]; the unnecessary intrusion of myriad local government units independent of Federal and State control and bereft of the means to undertake the complex scientific evaluations necessary to make reasoned regulatory decisions would frustrate that

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[3]*See* H.R. Rep. No. 511, 92d Cong., 1st Sess. 1 (1971); 117 Cong. Rec. 40,067 (1971) (statement of Rep. Mizell).

system. It is thus without merit to assume that Congress intended to empower more than 83,000 local units of government[4] to impose multiple levels of regulation in addition to those of the Federal government and the States.

Section 24 of FIFRA, 7 U.S.C. Section 136v, grants limited authority to the States to regulate pesticides[5], but expressly preempts State labeling and packaging and grants no authority to local jurisdictions. Subsection (a) provides that States can regulate the

[4] *See* U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1990, at 271-72 (110th ed.).

[5] Although subsection 24(c) authorizes the States to register additional uses of federally registered pesticides to meet "special local needs," the Administrator of the Environmental Protection Agency ("EPA") may suspend that authority if a State's controls are inadequate to "assure that State registration under this section will be in accord with the purposes of this Act . . . . "

sale or use of pesticides "but only if and to the extent that the regulation does not permit any sale or use prohibited by this Act." Subsection (b) provides that States "shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this Act."[6] Congress has conferred primary

[6] "Labeling" is defined in subsection 2(p)(2), 7 U.S.C. Section 136(p)(2). Congress enacted subsection 24(b) to ensure uniform nationwide labeling and packaging of pesticides. In its 1988 amendments to FIFRA, Congress added the heading "Uniformity" to subsection 24(b) without changing the text. Federal Insecticide, Fungicide, and Rodenticide Act Amendments of 1988, Pub. L. No. 100-532, Section 801(m)(2), 102 Stat. 2654, 2682 (1988). Accordingly, *all* State and local government regulation of pesticide labels, labeling and packaging, including but not limited to warnings, precautionary statements, directions for use and other EPA-required matter, is expressly preempted by FIFRA. Even the Report of the Senate Committee on Commerce states that under the Committee's proposed amendments to Section 24, "Subsection (b) preempts any State or local government labeling or packaging requirements differing from such requirements under the Act." S. REP. No. 970, 92d Cong., 2d Sess.

enforcement responsibility for pesticide use violations upon the States, but only if the EPA Administrator determines that they can perform this responsibility; and such authority may be rescinded if a State program is deemed to be inadequate. Sections 26, 27; 7 U.S.C. Sections 136w-1, 136w-2. The Administrator may authorize States to issue Experimental Use Permits pursuant to EPA-approved centralized State plans subject to "such terms and conditions as [the Administrator] may by regulations prescribe," and certify pesticide applicators pursuant to EPA-approved

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44 (1972).

The decision of the Supreme Court of Wisconsin does not implicate the preemption of labeling or packaging in subsection 24(b), but focuses exclusively on whether local governments can regulate pesticide use under subsection 24(a). Thus the scope of subsection 24(b) is not at issue in this case.

centralized State plans. Sections 5(f), 11(a)(2), 7 U.S.C. Sections 136c(f), 136i(a)(2). State agencies may also petition the Administrator for exemptions to FIFRA to deal with emergency conditions. Section 18, 7 U.S.C. Section 136p.

The definition of "State" in Section 2(aa) of FIFRA, 7 U.S.C. Section 136(aa), does not expressly include local government units.[7] Petitioners devote a

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[7]Federal environmental statutes which provide for independent local regulation frequently contain definitions of "municipality" separate from those of "State," define the word "person" to include political subdivisions, or do both. *See, e.g.*, Clean Air Act, 42 U.S.C. Sections 7602(e), (f) ("municipality," "person"); Clean Water Act, 33 U.S.C. Sections 1362(4), (5) ("municipality," "person"); Safe Drinking Water Act, 42 U.S.C. Sections 300f(10), (12) ("municipality," "person"); Resource Conservation and Recovery Act, 42 U.S.C. Section 6903(9), (13), (15) ("intermunicipal agency," "municipality," "person"); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. Section 9601(21) ("person"); Emergency Planning and Community Right-to-Know Act, 42 U.S.C. Section 11049(7)

substantial portion of their Brief to supporting the dissenting opinion of Justice Steinmetz below that failure to read local governments into the definition of States achieves the anomalous result of permitting independent local regulation of pesticide labeling and packaging. *See* Brief for Petitioners at 30-31 & n.5, 33-40, 154 Wis. 2d at 48, 452 N.W.2d at 568. This argument only suggests that local governments, being mere creatures of the State, have no greater authority than the State itself. It does not follow, then, that in areas where the States themselves may regulate, local regulation perforce is permitted. If Congress intended the term "State" specifically to include political subdivisions in addition to its

("person").

usual meaning, Congress could easily have been explicit.[8]

Contrary to the dissents below (154 Wis. 2d at 35-36, 48, 452 N.W.2d at 562-63, 568) and the Brief for Petitioners at 16-18, 30-39, 99 n.34, 102, those rare instances in which FIFRA mentions political subdivisions do not confer regulatory authority upon them. Section 8(b), 7 U.S.C. Section 136f(b), deals with inspections of records "upon request of any officer or employee of the Environmental Protection Agency or of any State or political subdivision, *duly designated by the Administrator* . . .," such inspections to be made "[f]or the

[8] *Compare* the definition of "State" in 29 U.S.C. Section 1002(10) (similar to FIFRA) *with* 29 U.S.C. Section 1144(c)(2) ("State" includes "any political subdivisions thereof, or any agency or instrumentality of either . . . ."). Indeed, this Court's own rules regarding *amicus* briefs distinguish between States and their political subdivisions. *See* SUP. CT. R. 37.5.

purposes of enforcing the provisions of this Act." (emphasis added). Nonetheless, in Section 9(a), 7 U.S.C. Section 136g(a), which provides for the inspection of establishments, the reference to officers or employees is limited to those of EPA "or of any State." It is thus apparent that even in such a routine matter as inspection authority, Congress distinguished between States and their political subdivisions.[9]

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[9]The reference to Section 23(a), 7 U.S.C. Section 136u(a), in the concurring opinion in *Professional Lawn Care Ass'n v. Village of Milford*, 909 F.2d 929, 936-37 (6th Cir. 1990), petition for cert. pending, No. 90-382, and the Brief of the Solicitor General at 5, 12, is not inconsistent with this conclusion. Section 23(a)(1) authorizes the Administrator of EPA to enter into cooperative agreements with States to "delegate to any State . . . the authority to cooperate *in the enforcement of this Act* through the use of its personnel or facilities, to train personnel of the State . . . to cooperate *in the enforcement of this Act*, and to assist States . . . in implementing cooperative enforcement programs through grants-in-aid;" (emphasis added). Although nothing in Section 23(a) precludes a State from designating personnel or facilities of local governments to participate in enforcing FIFRA, it strains the language of this provision to conclude that "States" here also includes local governments merely because Section 8(b) expressly confers upon the *Administrator* the power to *designate* local officials to inspect records to enforce FIFRA.

The limitation in Section 23(a) to "States" is also significant because any State that enters into a cooperative agreement with EPA for the enforcement of pesticide use restrictions is granted primary enforcement responsibility for pesticide use violations. *See* FIFRA Section 26(b), 7 U.S.C. Section 136w-1(b).

The National Pesticide Monitoring Plan referred to in Sections 20(b) and (c), 7 U.S.C. Section 136r(b) and (c), makes clear that the National Pesticide Monitoring Plan and pesticide monitoring are EPA activities which are to be carried out "in cooperation with other Federal, State, or local agencies." Section 6(g)(1), 7 U.S.C. Section 136d(g)(1), merely requires notification to the Administrator and "appropriate State and local officials" of the

possession of a cancelled or suspended pesticide, the quantity possessed and the place where it is stored. It grants no independent authority to local officials nor does it impose any responsibilities upon them. The language of FIFRA makes clear that local officers or employees inspect records only as deputies of EPA. Local governments are limited to assisting EPA in carrying out certain of its duties; they are not authorized to exercise their own regulatory authority.

Finally, the dissenting opinion of Justice Abrahamson and the Briefs for Petitioners and the Solicitor General make much of the language in Section 22(b), 7 U.S.C. Section 136t(b), which requires the EPA Administrator to cooperate with "any appropriate agency of any State or any political subdivision thereof, in carrying out the provisions

of this Act, and in securing uniformity of regulations." Petitioners construe the last phrase in this very general section of the Act as negating all contrary legislative indicators and contradicting the structure of FIFRA by "contemplat[ing] there would be authority in municipalities to adopt pesticide regulations . . . ." Brief for Petitioner at 32.

Petitioners read far too much into this language. They would have the Court believe that uniformity is best achieved multilaterally. This is, very simply, an overstatement of the intent of Congress. It is also illogical. Even the Solicitor General's Brief did not argue that local jurisdictions should have regulatory autonomy. That Brief stated:

> Some [environmental problems] may more appropriately be addressed by a regulatory

> system characterized by a set of basic federal standards that States may supplement, either by their own regulations or by local regulations *adopted within the framework of appropriate state delegation*.

Brief for the United States as *Amicus Curiae* at 22 (emphasis added).

Moreover, the legislative history of FIFRA is unanimous in stating that the purpose of this provision is to "provide[] for cooperation by the Administrator with other Federal agencies and with agencies of State and local government *in carrying out the Act*." H.R. REP. NO. 511, *supra*, at 28 (1971); S. REP. NO. 838, 92d Cong., 2d Sess. 29; S. REP. NO. 970, *supra*, at 43. (emphasis added). Even if the issue of local regulation was as contentious as Petitioners assert, it is fanciful to conclude that Congress either granted or reserved through the

back door of Section 22(b) any autonomy to local governments to regulate pesticide use.

FIFRA thus provides powerful evidence that Congress intended only a derivative role for local governments in pesticide regulation. Preemption of local governments from enacting their own regulation of pesticide use is the only construction of FIFRA that is faithful to the intent of Congress to create a comprehensive system of primary Federal and coordinated supplementary State regulation.

B. The Legislative History of FIFRA Confirms the Intent of Congress to Exclude Local Governments from Independent Pesticide Regulation.

The legislative history of FEPCA confirms what the language of FIFRA already shows: Congress never intended to permit pesticide regulation by local

governments.

Certain conclusions from the legislative history are apparent. The House Committee on Agriculture assumed that "the 50 States and the Federal Government should provide an adequate number of regulatory jurisdictions," effectively precluding independent local regulation. *See* H.R. REP. NO. 511, *supra*, at 16. The Senate Committee on Agriculture and Forestry added express preemptive language to its Report. S. REP. NO. 838, *supra*, at 16. Efforts by the Senate Committee on Commerce to place amendments explicitly permitting local government regulation were rejected.

The Senate Committee on Commerce concluded that without an explicit reference to local governments, their power could be preempted under the

measure reported by the Senate Committee on Agriculture and Forestry and the language contained in its Report. The Report of the Committee on Commerce noted:

> While the Agriculture Committee bill does not specifically prohibit local governments from regulating pesticides, *the report of that committee states explicitly that local governments cannot regulate pesticides in any manner*. Many local governments now regulate pesticides to meet their own specific needs which they are often better able to perceive than are State and Federal regulators. The amendment of the Committee on Commerce is intended to *continue the authority of such local governments and allow them to protect their environment to a greater degree than would EPA*.

S. REP. NO. 970, *supra*, at 27 (emphasis added).

Further, the Committee on Commerce's specific analysis of its amendments to

Subsection 24(a) states:

> This section specifies the authorities *retained* by the States and local governments under the Act. Generally, the intent of the provisions is to *leave* to the States and local governments the authority to impose stricter regulations on pesticide use than that required under the Act.

Id. at 44 (emphasis added).

Notwithstanding the concerns expressed by the Committee on Commerce, the Senate Committee on Agriculture and Forestry filed a Supplemental Report which stated its opposition to the amendments of the Committee on Commerce and twice reiterated that any local pesticide regulation should be totally preempted. *See* S. REP. NO. 838, Part II, 92d Cong., 2d Sess., *reprinted* in 1972 U.S. CODE CONG. & ADMIN. NEWS 4026, 4066.

From August 1, 1972, to September 22, 1972, the staffs of the two Senate

Committees hammered out an amendment in the nature of a substitute. This substitute, with changes agreed to in Conference (none of which involved local regulation) became FEPCA. The Supplemental Report of the Committee on Agriculture and Forestry stated that the substitute, which was supported by all of the members of that Committee and most of the members of the Committee on Commerce, "met essentially all of the objections raised in this report." *Id., reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS at 4088. The Explanation of the Compromise Substitute stated that the substitute "has been prepared resolving all of the differences." 118 CONG. REC. 32,257 (1972). The Explanation further stated pointedly that "Commerce Committee amendments . . . [including amendment] 10

(authority of local governments to regulate the use of pesticides) . . . are not included in the substitute." *Id.* at 32,258.

When H.R. 10729 was taken up on the Floor of the Senate, the amendments of the Committee on Commerce were introduced, including Amendment 10. *Id.* at 32,249-51. Thereafter, Senator Allen asked for and received unanimous consent that "notwithstanding the fact that the committee [on Commerce] amendments have not been agreed to, it be in order to offer a complete substitute for the whole bill; and that if the substitute should be agreed to all of the committee amendments be considered as having been withdrawn." *Id.* at 32,252. The explanation of H.R. 10729 that appeared in the Report of the Committee on Agriculture and Forestry and the

Explanation of the Compromise Substitute were ordered printed in the Congressional Record. *Id.* at 32,252, 32,257. All of the Senators who participated in the debate lauded the substitute, and none noted the absence of the amendments authorizing local regulation. The Senate then approved the substitute unanimously. *Id.* at 32,263.

As the majority opinion below and the opinion in *Maryland Pest Control Association v. Montgomery County*, 646 F. Supp. 109 (D. Md. 1986), *aff'd without opinion*, 822 F.2d 55 (4th Cir. 1987) demonstrate, the intent of Congress could hardly have been more apparent. All concerned assumed that failure to include local governments deprived them of regulatory authority. This was not an instance where a compromise papered over disagreements. The parties did not

"agree[] to disagree," as stated in the dissent by Justice Abrahamson below, 154 Wis. 2d at 43, 452 N.W.2d at 565, and the majority in *People* ex rel. *Deukmejian v. County of Mendocino*, 36 Cal. 3d 476, 492-93, 683 P.2d 1150, 1160-61, 204 Cal. Rptr. 897, 907-08 (1984).[10] The position of the Committee on Agriculture and Forestry clearly prevailed over that of the Committee on Commerce, and no dissent

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[10]Within weeks after the decision of the Supreme Court of California in *County of Mendocino*, the California Legislature enacted a statute overruling it. Accordingly, regulation of pesticide registration, sale, transportation or use was declared to be of "statewide concern," and "[e]xcept as otherwise specifically provided in this code, no ordinance or regulation of local government, including, but not limited to, an action by a local governmental agency or department, a county board of supervisors or a city council, or a local regulation adopted by the use of an initiative measure, may prohibit or in any way attempt to regulate any matter relating to the registration, sale, transportation, or use of economic poisons, and any of these ordinances, laws, or regulations are void and of no force or effect." Cal. Food & Ag. Code Section 11501.1(a) (West 1986).

was raised on the Senate Floor. The House likewise was in accord.

The legislative history of FEPCA thus reinforces the conclusion that Congress intended to create a comprehensive and coordinated system involving only the Federal government and the States to regulate the use of pesticides, and that a separate role for local governments was expressly considered and unequivocally rejected. It is impossible to believe that in the face of this intensive Congressional attention to the role of local governments, which resulted in the merely derivative functions Congress provided them in FIFRA, the absence of explicit preemption language would result in myriad local jurisdictions having independent, conflicting and overlapping authority over this very difficult and

contentious regulatory activity.

II. FIFRA IMPLIEDLY PREEMPTS LOCAL REGULATION OF PESTICIDE USE.

It is noteworthy that in *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973), the Federal statute contained "no express provision of pre-emption" of local regulation.[11] *Id.* at 633. Yet "[i]t is the pervasive nature of the scheme of Federal regulation" that led the Court to conclude that preemption was implied. *Id.*

A. The Coordinated Federal-State Regulatory System Covers the Field to the Exclusion of Local Regulations.

[11]Although the Senate version of the Noise Control Act of 1972, Pub. L. No. 92-574, 86 Stat. 1234 (1972) contained an express preemption section, the statute as enacted did not. Instead, the Court relied on statements of the Chairman of the House Committee on Interstate and Foreign Commerce and a member of the Senate Committee on Public Works on the Floor of their respective chambers and the message of the President on signing the final bill. *Id.* at 636-38.

In this case, Congress adopted a "comprehensive regulatory statute," *Ruckelshaus v. Monsanto Company, supra,* and expressly incorporated a role for State regulation. It can fairly be said that FIFRA's coordinated pesticide regulatory scheme is pervasive. Just as the Federal system enacted for control of aircraft noise left no room for local curfews or other local controls, *City of Burbank, supra,* at 638, regulation of pesticide use likewise is subject to "an elaborate and detailed system of controls." *Id.* at 634 (quoting *Northwest Airlines, Inc. v. Minnesota,* 322 U.S. 292, 303 (1944) (Jackson, J., concurring)). The express language of FIFRA contemplates a pervasive system of primary Federal regulation coordinated with supplementary centralized State controls, and this comprehensive system

occupies the field.[12] It is not logical that FIFRA contemplates, atop coordinated Federal and State regulation, the prospect of local units of government such as the Town of Casey creating schemes for controlling pesticide use that may be more extensive than their telephone directories. As the Senate Committee on Agriculture and Forestry recognized, the *authority* to regulate must be commensurate with the *ability* to regulate. *See* S. REP. NO. 838, *supra*, at 16.

Amici Milford, Michigan; Mayfield Village, Ohio; and Boulder, Colorado do not recognize this fundamental

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[12]EPA's only published interpretation, permitting local assistance with a State applicator certification program only if it is "uniform throughout the State and is totally responsive to State direction," is in complete accord. *See* 40 Fed. Reg. 11,700 (Mar. 12, 1975).

proposition. Their Brief contends that if this Court finds that Congress impliedly preempted local governments, then preemption should be in those areas where the Federal and State governments must act. Thus they argue:

> Given the cost and complexity of such determinations, only a small portion of local pesticide laws, such as local bans on the use of particular pesticides or local permitting decisions that have the same effect, revisit these determinations, and thus only those laws would be preempted on the ground that they enter this field or conflict with federal regulation.
> . . . .
>
> Under these rationales, local governments would be precluded from making registration decisions--the core activity of EPA under FIFRA. Thus, local laws that ban or restrict the use of certain pesticides would be preempted, although local governments could still impose limitations in their proprietary or contracting capacity on pesticide use on public lands, in public

> buildings or pursuant to local government contracts.

Brief at 27, 28.

Under their rationale, requirements for a permit for application to private lands, submission of detailed technical information and hearings are tantamount to registration decisions. These requirements are at the heart of Ordinance 85-1, and because they duplicate the "core activity of EPA under FIFRA", would be preempted.

B. Local Pesticide Regulation Is Unnecessary for Protection of Wellhead Areas Under the Safe Water Drinking Act.

Petitioners and the Solicitor General make much of the purported ability of local governments to exercise discretion in enacting specific pesticide controls from the Safe Drinking Water Amendments of 1986, Public Law No. 99-339 (1986). Petitioners devote a

considerable portion of their Brief to the wellhead protection program in 42 U.S.C. Section 300h-7(a). Brief for Petitioners at 77-87. However, Section 300h-7 makes clear that local governments were not intended to have an independent role in wellhead protection. Section 300h-7(a) provides:

> The Governor or the Governor's designee of each State shall, within three years [of June 19, 1986], adopt and submit to the Administrator a State program to protect wellhead areas within their jurisdiction . . . Each State program under this section shall, at a minimum--
>
> > (1) specify the duties of State agencies, local governmental entities and public water supply systems with respect to the development and implementation of programs required by this section.

The remaining provisions of Section 300h-7 make it clear that the planning and implementation are to be conducted on a

state-wide basis. Local government agencies in the wellhead protection program are not given independent authority[13]; their powers are derived from the role which the State may specify. Indeed, the Conference Report on the Safe Drinking Water Act Amendments is very clear that each State may adopt a unique method of protecting wellhead areas:

> Each State has the responsibility of determining how best to describe a program to protect the water supply within each protection area in the State. The provision is structured to afford States maximum flexibility in formulating a protection strategy. A State is not required to develop a regulatory program unless it chooses to do so . . . .

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[13]It should be noted that the Safe Drinking Water Act has a definition of "municipality" that is separate from that of "State." *See* n.7, *supra*.

> States can be expected to take a wide variety of approaches to protection of wellhead areas within their jurisdiction, and it is conceivable that each State could develop its own unique approach. Protection strategies may also vary for different protection areas within one State. The amendment recognizes that States are best able to assess specific problems within their jurisdictions, and to develop and implement necessary protection measures.

H.R. REP. No. 575, 99th Cong., 2d Sess. 45 (1986).

A state has "maximum flexibility" in choosing a role for local governments in wellhead protection. In some instances a state may choose to confer expansive authority on local governments; in others, a state may choose to exclude their participation altogether. Pesticide regulatory autonomy is thus unnecessary for local agencies to fulfill any wellhead protection functions

conferred by the State.

III. LOCAL PESTICIDE REGULATION IS CONTRARY TO THE PUBLIC INTEREST.

The Town of Casey and its Ordinance 85-1 provide a classic example of the problems inherent in autonomous regulation of pesticide use by local governments and the prescience of the Report of the Senate Committee on Agriculture and Forestry. As a remote rural town of fewer than 500 tucked away in the northwest corner of Wisconsin, Casey lacks the financial resources and the technical expertise necessary to make informed scientific decisions to enforce its extensive pesticide regulatory ordinance. Even such matters as the control and measurement of pesticide drift call for specialized training and expertise which the Town does not possess.

Neither the Wisconsin Legislature nor any State agency expressly authorized the Town of Casey to enact Ordinance 85-1 or any of its predecessors. Nonetheless, under Ordinance 85-1 the Town could reject any pesticide use permitted under FIFRA and by Wisconsin even where the use would be limited to private lands. Indeed, the permit which the Town granted Respondent Mortier banned aerial spraying and limited the land over which he could spray.

A. Local Pesticide Regulation Involves Economic and Social Costs That Can Harm the Quality of Life.

Ordinance 85-1 adopts a definition of pesticide even broader than that set forth in FIFRA.[14] It also defines

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[14]Section 1.1(2) of Ordinance 85-1 not only codifies FIFRA's definition but also includes State law and regulations (II Pet. App. at C5-6).

"public lands" to include all lands and interests in lands "owned by the state [and] the County of Washburn . . . and which are dedicated in whole or in part to public use and benefit." Section 1.1(4) (II Pet. App. at C6).

The scope of FIFRA is very broad. It obviously includes pest control agents used in agriculture and forestry. However, a walk through the aisles of any supermarket reveals that common kitchen and bathroom cleansers (e.g., Comet® and Vanish®), household disinfectants (e.g., Lysol®) and laundry bleaches (e.g., Clorox®) fall within FIFRA's scope. Pesticides also have very important institutional uses; restaurants, hospitals, offices of healthcare professionals, barbershops and beauty salons, food processing plants and other commercial establishments and structures

would be much less sanitary, and consequently more dangerous places, without them. Indeed, the flea and tick collars that pets wear are also pesticides.

Although Ordinance 85-1 is limited to spraying pesticides on land, the use of all of the products set forth above could be subject to bans, restrictions or permit requirements if localities were left to their own devices. Indeed, nothing but their imagination would prevent local governments from requiring notices or other restrictions if individuals sprayed for household insects, applied a disinfectant in bathrooms, dusted roses in their gardens, or protected themselves by putting disinfectant chemicals in their swimming pools. Pesticide producers, distributors and users such as the members of the

amici organizations, and individual homeowners, businesses and consumers can be confronted with the daunting challenge of complying simultaneously with Federal and State regulations and those adopted by counties, cities, towns and special local districts asserting jurisdiction even over the same parcel of land or structure requiring pest control services.

Local pesticide regulation has interfered, and can continue to interfere, with the use of pest control products to increase the abundance of crops and yields from forests, protect home values, maintain home food service and health care sanitation and protect trees and home surroundings.

Thus a by-law and regulation of the Town of Wendell, Massachusetts and its Board of Health, respectively, adopted

certain restrictions similar to Ordinance 85-1; some would have been extended to agricultural and domestic uses.[15] An ordinance enacted by the Village of Wauconda, Illinois, regulated a variety of commercial pesticide applications, including control of mosquitoes, household insects and lawn care. Users of pesticides, including landlords and tenants of public buildings, were required to register with the village, obtain a permit and pay an annual fee. The ordinance required users to post outdoor warning signs or indoor warning decals of specified size and message for

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[15]The Supreme Judicial Court of Massachusetts upheld the Attorney General's disapproval of the ordinance and by-law on state preemption grounds. *Town of Wendell v. Attorney General*, 394 Mass. 518, 476 N.E.2d 585 (1985).

72 hours after application.[16]

Ordinance 85-1 and others like it have a serious impact on the ability of railroads and utilities to maintain their rights-of-way and forest managers to maximize yields by protecting trees from insects and competing vegetation. This is the case with an ordinance of the Town of Lebanon, Maine, which prohibits any commercial spraying of herbicides for nonagricultural uses unless the spraying is first approved by a vote of the town meeting.[17]

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[16]*See Pesticide Public Policy Foundation v. Village of Wauconda*, 622 F. Supp. 423 (N.D. Ill. 1985), *aff'd without opinion*, 826 F.2d 1068 (7th Cir. 1987); *Pesticide Public Policy Foundation v. Village of Wauconda*, 117 Ill. 2d 107, 510 N.E.2d 858 (1987) (answering certified question that ordinance was preempted by Illinois law).

[17]The town meeting refused the request of an electric power company to spray to control the growth of vegetation along the utility's right-of-way. The Supreme Judicial Court of Maine rejected a FIFRA preemption challenge to the ordinance. *Central Maine Power Co. v. Town of Lebanon*, 571 A.2d 1189 (Me. 1990).

Typically, rights of way and forests cut across many local jurisdictions. Even though applications of pesticides are conducted in full compliance with Federal and State law, local regulation of these activities can result in requiring a single maintenance job to comply with literally dozens of local regulations. This not only increases the cost to perform these activities (with concomitant increases in freight rates and the price of forest products), but imposes significant delays and burdens on adjoining municipalities as well. The definition of "public lands" in Ordinance 85-1 as including lands owned by the State and Washburn County can reduce the ability of the State or County to eradicate predators such as gypsy moths.

By having to comply with the onerous provisions of Section 1.3 of the Ordinance (II Pet. App. at C7-16), wait a minimum of 60 days and potentially be subject to public hearings, the State or County would be hard pressed to make timely applications to deal with emergency pest infestations in areas in and around the Town of Casey. To the extent that unincorporated areas or other political subdivisions do not have such ordinances, those areas would be subject to greater infestation or would require more intensive and intrusive application of pesticides than otherwise necessary.

When southern California suffered an infestation of medflies in late 1989, the State proposed to use pesticides to eradicate the problem, just as it had done successfully earlier. This time, however, the cities of Los Angeles and

Fullerton enacted ordinances forbidding agricultural operations from their respective airports and banning aerial application of pesticides within their respective city limits.[18] The cities of Pasadena, Azusa and Lynwood adopted ordinances purporting to regulate formation flying within their boundaries, an action which would inhibit the State's ability to apply pesticides.[19] Except for the Azusa ordinance, which has expired, and notwithstanding California's express preemption of local pesticide regulation,[20] these ordinances remain in

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[18]*See State of California v. City of Los Angeles*, No. BS002736 (Super. Ct. Los Angeles County filed Aug. 29, 1990); *State of California v. City of Fullerton*, No. 625496 (Super. Ct. Orange County filed May 22, 1990).

[19]*See* State of California v. City of Pasadena, No. C755032 (Super. Ct. Los Angeles County filed Mar. 12, 1990).

[20]*See* n.10, *supra*, at 30.

effect.[21] Efforts by local governments to circumvent even the most explicit State legislation aimed at precluding local regulation underscores the inadequacy of relying solely upon State preemption of local authority.

This parochialization of pesticide regulation and resulting restrictions on pesticide use are unnecessary restraints upon the regulated localities and their neighbors. They burden commerce, inhibit responses to emergencies and increase the costs and complexities of compliance. Such consequences provide cogent reasons why Congress intended to prohibit local regulation of pesticide use in 1972.

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[21]The cities of Los Angeles, Glendale, Burbank and San Bernardino also filed suit against the State alleging that aerial pesticide spraying, even if consistent with FIFRA, constituted a public nuisance. *See Medfly Consolidated Cases*, Judicial Council Coordination Proceeding No. 2487 (Super. Ct. Los Angeles County consolidated Aug. 22, 1990).

B. Local Efforts at Pesticide Regulation Have Impeded Research into Alternatives to Conventional Pesticides.

Many of the members of *amicus* IBA are engaged in research into alternatives to traditional chemical pesticides using the techniques of genetic engineering. EPA has promulgated an integrated framework for regulating biotechnology under FIFRA[22] which enables EPA to become involved in regulating research into genetically engineered and nonindigenous pesticide candidates far earlier than with conventional pesticides. Nonetheless various local governments have succumbed to concerns about biotechnology by adopting ordinances which prohibit or seriously delay the ability of

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[22]*See* EPA, Statement of Policy; Microbial Products Subject to the Federal Insecticide, Fungicide, and Rodenticide Act and the Toxic Substances Control Act, 51 Fed. Reg. 23,313-36 (June 26, 1986).

researchers to conduct necessary environmental releases with Federal and State approval.

Two examples will show the way in which such ordinances can stifle research. First, in Monterey County, California, the Board of Supervisors passed two interim ordinances (February 18, 1986, and March 28, 1986) temporarily prohibiting experimental field tests using genetically altered bacteria, and adopted a final ordinance on May 12, 1987. The final ordinance[23] required a use permit, the submission of detailed information, including all information submitted to State and Federal agencies not considered to be trade secrets, and called for environmental review pursuant to the California Environmental Quality

[23]Monterey County, Cal. Ordinance 3233 (1987) (Monterey County Code Ch. 20.110).

Act, financial assurances and indemnification to the County and its employees. Violations each day were considered to be separate offenses punishable by a fine of up to $500, imprisonment for up to 180 days, or both. Permits could be issued with such conditions as the County Planning Commission deemed necessary to protect public health, safety and the environment. The final ordinance stated:

> The purpose of this Chapter is to establish a uniform County regulatory policy, standards, and permitting process pertaining to the location and siting of experiments involving the release of genetically engineered microorganisms into the environment with the end in view that public health and safety and the environment are afforded the maximum degree of protection. It is not the intent of this Chapter to enter the regulatory sphere occupied by the federal and state government; rather, it is the intent of this Chapter to more

> fully carry out County land use authority embodied in County land use plans and zoning ordinances by using them as primary guides in the determination of proper location for the conduct of genetic engineering experiments.[24]

Notwithstanding EPA's approval of an Experimental Use Permit for a small-scale field test of a genetically engineered pesticide candidate, and the State of California's own Experimental Use Permit approval, the County of Monterey determined, by Ordinance No. 3233, that it was uniquely well suited to regulate the location and siting of experiments involving the release of genetically engineered microorganisms. By doing so in the guise of a land-use ordinance to regulate a matter that was categorically preempted by Federal and State law,

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[24]MONTEREY COUNTY, CAL. CODE Section 20.110.020 (1987).

biotechnology research has effectively been shut down in Monterey County. Noting this consequence, the Monterey County Agricultural Commissioner wrote to the County's Board of Supervisors:

> The perceived political climate has affected testing of <u>Bacillus thuringiensis</u> products in Monterey County. Because these products would be of great benefit to locally produced crops, they must be tested here to assure efficacy and safety under local growing conditions. Because of the Genetic Engineering Experiments Ordinance, such testing is <u>not</u> being done in Monterey County.
>
> Monterey County is known as the salad bowl of the world, but is in danger of losing this title by not allowing vital experimentation with biologically sound alternatives to the toxic pesticides currently being used to control various pests. Experimentation in the actual growing region is an essential step preceding registration of new products.

(emphasis in the original).[25]

The Monterey County ordinance is still in effect.

Second, efforts to impose restrictions on the environmental release of genetically engineered organisms have been unsuccessfu in the New Jersey Legislature. Nonetheless, the City of Estell Manor and Shamong Township have adopted ordinances which severely restrict and delay such research.[26]

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[25]Memorandum from Richard Nutter to the Monterey County Board of Supervisors (June 21, 1988), reprinted in the Appendix to this Brief.

[26]Shamong Township Ordinance 1988-1 requires any researcher proposing to release a genetically engineered microorganism, inter alia, to apply for a permit and pay a $1,000 processing fee at least six months before the release, have not less than $5 million in liability insurance and prepare a detailed risk assessment and a contingency plan to deal with potential environmental damange. The release would be permitted only after the Township Council approves it after a public hearing. Violators are punishable by fines and imprisonment, and the municipal attorney may seek injunctive relief. *See* N.Y. Times, March 20, 1988, Section 12 (N.J.

Clearly, Congress did not intend that local units of government would be able to inveigh against a comprehensive regulatory scheme by manipulating zoning laws or passing other legislation to grind research to a screeching halt. Such a Draconian effect demonstrates the folly of autonomous Balkanization of regulatory authority that Petitioners support so zealously. The Court need not speculate about the prospective impact of local pesticide regulation: it need only look to Monterey County to confirm its

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Weekly), at 4, col. 5. Estell Manor Ordinance No. 87-8 (1987) requires a permit issued after a public hearing. The City's governing body is empowered to adopt regulations similar in nature to those in the Shamong ordinance. Violators are also subject to fines and imprisonment. Both ordinances are still in effect. To the extent these ordinances regulate release of genetically engineered pesticides or pesticide candidates, they have not been approved by the New Jersey Department of Environmental Protection as required by state law. *See* N.J. STAT. ANN. Section 13:1F-13 (1985), enacted in 1971.

effects.

If agricultural biotechnology is to achieve its promise to contribute to restoring the competitive position of the United States and to create products that will replace traditional chemical pesticides, it is necessary to eliminate the potential for local legislation responding to fear and ignorance which can overwhelm carefully controlled research efforts approved by Federal and State authorities. A decision by this Court holding that FIFRA preempts such local regulation will go a long way in permitting this vital research to proceed in a timely fashion.

CONCLUSION

For the foregoing reasons, the Judgment of the Supreme Court of Wisconsin should be affirmed.

Respectfully submitted,

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March 27, 1991

APPENDIX

MEMORANDUM

AGRICULTURAL COMMISSIONER
COUNTY OF MONTEREY

JUNE 21, 1988

TO: MONTEREY COUNTY BOARD OF SUPERVISORS

FROM: RICHARD NUTTER, AGRICULTURAL COMMISSIONER

SUBJECT: GENETIC ENGINEERING EXPERIMENTS ORDINANCE

In May of 1987 your Board adopted the Genetic Engineering Experiments Ordinance. Since that time, there have been no applications to perform experimental work with genetically altered organisms.

No research authorizations for experiments with genetically altered microbial organisms have been submitted to Monterey County during the past year.

Two companies, Mycogen Corporation and Ecogen, have indicated concerns regarding performing research with any type of microbial organism in Monterey County.

Mycogen Corp. indicated that it has avoided work in Monterey County because it is an "unknown political environment" and there is no desire to create controversy regarding their products. This company has performed experimental work with Bacillus thuringiensis and with

a fungus that kills a common weed, cheese weed. This work has been done in Fresno and San Diego Counties.

Another company, Ecogen, has experimented with Bacillus thuringiensis crosses on lettuce and broccoli in Santa Barbara and Fresno Counties. Advanced Genetic Sciences has obtained a research authorization for experimentation with naturally occurring Pseudomonas bacteria on celery, cauliflower,and cotton in Contra Costa, Fresno, Tulare, and Kern Counties.

The perceived political climate has affected testing of Bacillus thuringiensis products in Monterey County. Because these products would be of great benefit to locally produced crops, they must be tested here to assure efficacy and safety under local growing conditions. Because of the Genetic Engineering Experiments Ordinance, such testing is not being done in Monterey County.

Monterey County is known as the salad bowl of the world, but is in danger of losing this title by not allowing vital experimentation with biologically sound alternatives to the toxic pesticides currently being used to control various pests. Experimentation in the actual growing region is an essential step preceding registration of new products.

For the sake of growers in this county, as well as those consuming such commodities, there should not be this additional step for performing research

with genetically altered microbials. There are adequate protections through existing federal, state, and county regulatory systems.

I recommend that the Genetic Engineering Experiments Ordinance not be continued as a part of the Monterey County zoning ordinance. It is unnecessary and cumbersome and is to our disadvantage.

RWN/SEC: sec